

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YVETTE PLUMMER, et al.,)

Plaintiffs,)

v.)

COUNTY OF ALAMEDA,)

Defendant.)

No. C94-0838-EDL consolidated with
No. C94-4082-EDL

JURY INSTRUCTIONS

DATED: October 30, 1998

ELIZABETH D. LAPORTE
UNITED STATES MAGISTRATE JUDGE

3.1 DUTIES OF JURY TO FIND FACTS AND FOLLOW LAW

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return—that is a matter entirely up to you.

3.2 USE OF NOTES

You may use notes taken during trial to assist your memory. Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

3.3 WHAT IS EVIDENCE

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;
2. the exhibits which have been received into evidence; and
3. any facts to which all the lawyers have agreed or stipulated.

3.5 WHAT IS NOT EVIDENCE

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.
3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

3.6 DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

3.7 CREDIBILITY OF WITNESSES

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness' memory;
3. the witness' manner while testifying;
4. the witness' interest in the outcome of the case and any bias or prejudice;
5. whether other evidence contradicted the witness' testimony;
6. the reasonableness of the witness' testimony in light of all the evidence; and
7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

3.11 CHARTS AND SUMMARIES IN EVIDENCE

Certain charts and summaries have been received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

3.12 MULTIPLE PLAINTIFFS—DIFFERENT LEGAL RIGHTS

You should decide the case as to each plaintiff separately. Unless otherwise stated, the instructions apply to each plaintiff.

4.1 DUTY TO DELIBERATE

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

4.2 COMMUNICATION WITH COURT

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

5.1 BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

6.1 PUBLIC ENTITY ENTITLED TO FAIR TREATMENT

Defendant Alameda County is a public entity. All persons are equal before the law and a public entity is entitled to the same fair and conscientious consideration by you as any other person.

TRANSITION INSTRUCTION

Each plaintiff claims that defendant Alameda County, through the actions of its employees, treated him or her differently due to his/her race or national origin in terms and conditions of employment. This is called “disparate treatment.” I have already read to you and given you a copy of an instruction briefly summarizing the claims and defenses in this case. I will not reread that instruction. However, you may refer to it during your deliberations.

I will now instruct you on the law relating to race discrimination based upon disparate treatment.

DEFINITION OF ETHNICITY

For convenience sake, disparate treatment due to “race or national origin” will be commonly referred to in these instructions as disparate treatment based upon “ethnicity.”

11.5.1

THE ELEMENTS OF EACH PLAINTIFF'S DISPARATE TREATMENT CLAIM

Each plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. the plaintiff was adversely treated in his or her employment by the defendant

("adversely treated" means for example, not selected for a position, not made civil service, not given job assignments need for reclassification, denied an opportunity to apply for a position, or not promoted) and;
2. plaintiff's ethnicity was a motivating factor in the defendant's decision to take the adverse action against the plaintiff.

If you find that each of these things has been proved by a particular plaintiff, your verdict should be for that plaintiff on his or her disparate treatment claim. On the other hand, if any of these things has not been proved, your verdict should be for the defendant on that plaintiff's disparate treatment claim.

MOTIVATING FACTOR

To show that ethnicity was a motivating factor in the County's decision that adversely affected the plaintiff, the plaintiff is not required to prove that ethnicity was the sole motivation or even the primary motivation for the County's decision. The plaintiff need only prove that his or her ethnicity was a significant factor in the County's decision, even though other factors may have motivated the County's decision.

11.5.2

CIVIL RIGHTS TITLE VII—DISPARATE TREATMENT—"MIXED MOTIVE CASE"

You have heard evidence that the defendant's decisions that adversely affected the plaintiffs were motivated by the plaintiff's ethnicity and by a lawful reason. If you find that each plaintiff's ethnicity was a motivating factor in the defendant's decision to take the employment action which adversely affected that plaintiff, that plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's decision regarding a plaintiff was motivated both by ethnicity and a lawful reason, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have made the same decision even if the plaintiff's ethnicity had played no role in the employment decision.

I will provide the jury with forms so that it can report special interrogatories on the jury's finding on this question.

BUSINESS JUDGMENT RULE

An employer has the right to make employment decisions, such as selection for a position, work assignments, employment classifications, and entitlement to promotions for a good reason, a bad reason, or no reason at all, absent intentional discrimination on the basis of ethnicity.

HOSTILE WORK ENVIRONMENT

Plaintiff Prince Lewis claims that he was subject to racial harassment in the form of a hostile work environment.

In order to prevail on his claim that he suffered racial harassment in the form of a hostile work environment, Prince Lewis must prove each of the following elements by a preponderance of the evidence:

1. Cynthia Reifschneider subjected Prince Lewis to intentional discrimination because of his race by conduct that permeated the workplace with intimidation, ridicule, and insult because of his race;
2. this alleged conduct was pervasive and regular;
3. Prince Lewis actually found the working environment to be hostile; and
4. the intimidation, ridicule, and insult because of his race were sufficiently severe or pervasive to alter the conditions of Mr. Lewis' employment and create an abusive working environment.

A single instance of an offensive epithet is not enough. Instead, the conditions must be sufficiently severe or pervasive so as to create an environment that a reasonable person would find hostile and abusive.

You must look at a number of circumstances in determining whether an environment is hostile, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

If Prince Lewis fails to prove each of these elements by a preponderance of the evidence, then

you must find in favor of the County on Mr. Lewis' racial harassment claim.

EVIDENCE OF DISMISSED CLAIMS

Evidence has been presented that some of the claims made by plaintiffs Caillouet, Gomez, Plummer and Robles and some of the witnesses were dismissed prior to trial. You should not infer from this evidence that the remaining claims being submitted to you have been found by the Court to have merit. Nor should you infer from this evidence that the remaining claims lack merit. You should not speculate about the reasons claims were dismissed or not dismissed.

7.1

DAMAGES — PROOF

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for a particular plaintiff, you must determine that plaintiff's damages. Each plaintiff has the burden of proving his or her damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

1. The reasonable value of earnings lost to the present time.
2. The emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

Each plaintiff has the burden of proving damages by a preponderance of the evidence and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

7.3 DAMAGES—MITIGATION

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. that plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

ECONOMIC DAMAGES

If you reach the question of Ms. Caillouet's economic damages and decide to accept the defendant's calculations of Ms. Caillouet's damages you must assume a zero (0) number for the difference between her actual pay and what she would have earned for the years 1990 and 1991, because negative numbers are not used in determining damages.

If you find liability on any of the remaining plaintiffs' claims regarding denial of positions, the parties have stipulated that economic damages are determined to be:

Yvette Plummer: \$50,000

Berdie Gomez: \$55,000

Ruben Robles: \$30,000

Prince Lewis (Account Clerk II position claim): \$5,382

ELECTION OF FOREPERSON -- SPECIAL VERDICT

Upon retiring to the jury room, you will select one of your number to act as your foreperson.

The foreperson will preside over your deliberations, and will be your spokesperson here in Court. A form of special verdict for each plaintiff has been prepared for your convenience. You will take these forms to the jury room.

You will note that each of the interrogatories or questions calls for a "Yes" or "No" answer.

The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question. As you will note from the wording of the questions, it will not be necessary to consider or answer any subsequent questions if your answer to a prior question is "No".

VERDICT --UNANIMOUS — DUTY TO DELIBERATE

The verdict as to each plaintiff must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges --judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

4.3 RETURN OF VERDICT

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict form or forms and advise the court that you have reached a verdict.